

## Fighting Corruption: A Principled Approach: The C Principles (Combating Corruption)

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### Recommended Citation

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Available at: <http://scholarship.law.cornell.edu/cilj/vol33/iss3/6>

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# Fighting Corruption: A Principled Approach; The C<sup>2</sup> Principles (Combating Corruption)

David Hess\*  
Thomas W. Dunfee\*\*

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## Introduction

[Corruption] deepens poverty; it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths.<sup>1</sup>

Corruption is widely condemned yet widely practiced. Firms establish procedures to assure that their employees are not bribed by others, while simultaneously using bribes to obtain business. Firms from countries with minimal domestic corruption play a major role as bribe-payers in corrupt environments.<sup>2</sup> Many explanations may be offered for these seemingly inconsistent actions by private firms. Their participation in some forms of corruption may be explained by a variety of factors including competitive necessity, respect for local cultural norms, extortion, and inability or unwillingness to control rogue employees. At the same time, public opinion appears to be turning strongly against corrupt practices and demanding that something be done about bribery. A confluence of factors has produced a changing environment in which corruption is now viewed as extremely problematic. If these trends continue, firms will do their shareholders a disservice if they fail to take aggressive steps to ensure that they are not perceived as contributing to corruption. Yet firms face the problem that they may find themselves at a competitive disadvantage if they refuse to pay bribes while others continue to do so.

This article describes one viable strategy for firms: a commitment to Sullivan-like anti-bribery principles.<sup>3</sup> We present a specific set of principles, which we have termed the C<sup>2</sup> Principles,<sup>4</sup> for voluntary adoption by firms. These principles require firms to implement procedures to prevent the payment of bribes and to publicly disclose their progress and efforts towards these ends.

Part I of this article documents the costs of corruption on society and reviews empirical evidence on the importing and exporting of corruption

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1. The *Durban Commitment to Effective Action Against Corruption*, signed by 1600 delegates from 135 countries at the October 1999 Anti-Corruption Conference sponsored by Transparency International.

2. Interestingly, there are a few countries for which the opposite is true. In some cases, firms from more corrupt home environments are perceived as relatively less likely to pay bribes in foreign transactions. See *infra* Part I.B (discussing the empirical evidence of which countries' firms are paying bribes).

3. See *infra* Part IV.A.

4. The term "C<sup>2</sup> Principles" emphasizes that they are focused on and limited to combating corruption. These principals have been expressly endorsed and approved by the Caux Roundtable as a recommended means of implementing Principle No. 7 of the Caux Roundtable's *Principals for Business*. See *infra* note 80 and accompanying text. The Caux Roundtable is an international organization of senior business leaders. In 1994, they published an influential set of principles to provide a worldwide standard for responsible corporate behavior. See the Caux Roundtable's homepage (visited Dec. 22, 2000) <<http://www.cauxroundtable.org/>>. Should they be endorsed and supported by one or more academic centers and/or business organizations, they may be identified with the endorsing organization(s).

in international business. Part II discusses the emerging worldview that corruption is a problem that must be eradicated and its implications for corporate management. Part III considers businesspersons' possible explanations and justifications for paying bribes. Part IV discusses a Sullivan-type principles approach and presents the C<sup>2</sup> Principles for adoption by firms.

### I. The Paradox of Corruption

Our analysis is limited to coarse bribery of public officials by representatives of private sector firms. The term "coarse" distinguishes clearly harmful bribery from common practices involving social gifts and entertainment and cases where payments may constitute an authentic and accepted method of compensation. Although such provincial bribery may indeed be damaging, particularly when considered as a slippery slope leading to coarse bribery, it is not the primary concern here. Coarse bribery is defined as the promise or payment of a benefit that induces a public official to breach a duty pertaining to a significant community interest. This definition is somewhat narrower than the definition used by the World Bank: "the use of public power for private benefit."<sup>5</sup> In most cases, coarse bribery involves the payment of substantial sums of money or goods. However, in some cases, this form of bribery may involve a relatively small sum of money, as for example, in the case of an official in a developing country taking a relatively small sum of money to allow violations of important environmental or construction code regulations. Coarse bribery will generally be referred to as "corruption." Vito Tanzi indicates that corruption is most likely in investment projects, procurement spending, and extra-budgetary accounts.<sup>6</sup> Since the present concern is corporate bribe payers, the role of government policies will not be considered except as relevant to the limited focus.<sup>7</sup>

Scholars studying the corruption phenomenon have noted a unique paradox: corruption is universally disapproved yet universally prevalent.<sup>8</sup> This paradox continues even though the 1990s saw corruption become one of the most important policy issues in the international economy. In 1997, nations belonging to the Organization for Economic Cooperation and

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5. Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 45 IMF STAFF PAPERS 559, 564 (1998).

6. *Id.* at 568-69.

7. For an excellent discussion of the issue of corruption in government with an emphasis on demand-side solutions, see generally SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT* (1999) (analyzing the corruption cleansing potential of better pay for officials, criminal enforcement and civil service reforms). For a review of both supply-side and demand-side solutions to international bribery, see Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657 (2000).

8. See, e.g., Francois Vincke, *The State and the Civil Society in the Fight Against Corruption: The Business Community's Attitude Towards Corruption. Special Focus on Private-to-Private Corruption*, Paper Prepared for Presentation at the 8th International Anti-Corruption Conference (Sept. 7-11, 1997) (visited Oct. 25, 2000) <<http://www.oecd.org/daf/nocorruption/pdf/vincke.pdf>>.

Development (OECD) signed the anti-corruption convention, which highlights this invigorated focus on corruption.<sup>9</sup> At the same time, however, one-third of the respondents to Transparency International's 1999 survey of private sector leaders in fourteen emerging market economies estimated that corruption has increased over the past five years.<sup>10</sup> How are we to understand these contradictory trends? This section provides an overview of modern corruption's impact and the manner in which corrupt practices flow between regions of the world.

### A. The Costs of Corruption

The level of corruption that persists is staggering in scope; it involves enormous sums of money. While it is impossible to determine the current precise level of coarse bribery, a 1997 World Bank estimate placed the total corruption involved in international trade at \$80 billion per year.<sup>11</sup> A recent World Bank survey of 3600 firms in sixty-nine countries found that 40% of those businesses pay bribes.<sup>12</sup> In industrial countries, 15% of businesses were found to pay bribes, but in the former Soviet Union, this figure jumped to over 60%.<sup>13</sup>

Tremendous levels of corruption impose many costs on societies. Corruption limits a government's ability to perform vital functions and may even threaten its overall effectiveness. The *Financial Times* recently reported that "deep corruption [in China] is corroding the exercise of state power."<sup>14</sup> Falsified accounts used to cover up this corruption have rendered China's official statistics "virtually meaningless."<sup>15</sup> In Ecuador, estimates indicate that the government could pay off its foreign debt in five years if corruption was brought under control.<sup>16</sup> In Argentina, corruption in the customs department defrauded the government out of \$3 billion in

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9. As of this writing, twenty countries have enacted domestic legislation in compliance with the Convention. See Beverly Earle, *Bribery and Corruption in Eastern Europe, the Baltic States and the Commonwealth of Independent States: What Is To Be Done?*, 33 CORNELL INT'L L.J. 483 (2000).

10. See Transparency Int'l, *The Transparency International Bribe Payers Survey* (visited Aug. 25, 2000) <<http://www.transparency.de/documents/cpi/bps.html>> [hereinafter *Bribe Payers Survey*]. In addition, 25 percent of respondents stated that corruption has decreased, 22 percent stated that corruption has stayed the same, and 20 percent did not know. See *id.*

11. See James Walsh, *A World War on Bribery*, TIME, June 22, 1998, at 16. The World Bank estimate is based on the assumption that bribery makes up five percent of all foreign direct investment and imports into countries with high levels of corruption. See *id.*

12. See Thomas Omestad, *Bye-Bye to Bribes: The Industrial World Takes Aim at Official Corruption*, US NEWS & WORLD REP., Dec. 22, 1997, at 42.

13. See *id.*

14. James Kynge, *China Uncovers Falsified Accounts in State Groups*, FIN. TIMES (London), Dec. 24, 1997, at 7.

15. *Id.*

16. See *Corruption Reports: A Sample of Corruption Cases From Around the World*, TI NEWSL. (Transparency Int'l), Sept. 1999. Corruption costs Ecuador approximately \$2 billion every year. See *id.*

revenues.<sup>17</sup> Officials estimated that 30% of all imports were under-billed and approximately \$10 billion of goods over a four-year period were brought into the country under the guise of being labeled "in transit" to another country, thus illegally avoiding import taxes altogether.<sup>18</sup> Corruption also influences government spending, moving it out of vital functions, such as education and public health, and into projects where public officials can more easily extract bribes.<sup>19</sup>

The personal financial gains of corrupt public officials show why these problems persist. In Mexico, suspicions surround the ability of Raul Salinas, the brother of former President Carlos Salinas, to amass a fortune of over \$120 million while serving as a public official.<sup>20</sup> South Korea convicted two former presidents for developing a fund of over \$900 million while they were in office in the 1980s and 1990s.<sup>21</sup> At the local level, in Grenoble, France, the city mayor was convicted for personally receiving \$1.8 million in 1989 while selling the city water system.<sup>22</sup>

Corruption also imposes tremendous costs on business. While American companies complain of lost contracts because of the Foreign Corrupt Practices Act (FCPA),<sup>23</sup> companies in other countries complain of the bribes they must pay to obtain those contracts. For example, German companies are estimated to pay over \$3 billion a year in bribes to obtain business contracts abroad.<sup>24</sup> In Indonesia, it is estimated that bribes to bureaucrats account for 20% of business costs.<sup>25</sup> In Albania, businesses lose approximately one-third of their potential profits to bribe payments, amounting to 8% of inventory turnover.<sup>26</sup>

## B. Importing and Exporting Corruption

Just as it is difficult to determine levels of bribery and corruption, it is equally difficult to determine which countries are producing the greatest supply of and demand for corruption. Secrecy is a defining characteristic

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17. See Andrea Campbell, *Argentines Give Import to Fraud Crackdown*, FIN. TIMES (London), Dec. 3, 1997, at 5.

18. See *id.*

19. See Tanzi, *supra* note 5, at 585-86; Paolo Mauro, *Corruption: Causes, Consequences, and Agenda for Further Research*, 32 FIN. & DEV. 11, 12 (1998) (finding that corruption lowers government spending on education and public health services).

20. See Walsh, *supra* note 11, at 16.

21. See Ken Guggenheim, *Corruption, Not Revolutions or Coups, Topples Governments These Days*, L.A. TIMES, Oct. 6, 1996, at A4.

22. See *id.*

23. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1 to -2 (1994)). Former U.S. Trade Representative Mickey Kantor stated that between April 1994 and May 1995, the government was aware of almost 100 contracts, valued collectively at \$45 billion, that U.S. firms lost due to competitor's bribes. See U.S. *Eyes International Measures to Combat Bribery*, JAPAN ECON. NEWSWIRE, Mar. 7, 1996, available in LEXIS; Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A10.

24. See Guggenheim, *supra* note 21, at A4; *Honest trade: A Global War Against Bribery*, ECONOMIST, Jan. 16, 1999, at 22, 23 [hereinafter *Honest Trade*].

25. See *Honest Trade*, *supra* note 24, at 24.

26. See *id.* at 23.

of corruption. As John Noonan has noted, no one boasts publicly about the bribes that they have paid or taken.<sup>27</sup>

Transparency International has led the way in attempting to determine which countries are the home of bribe-takers, i.e., which countries have public officials who are abusing their position for their own personal profit.<sup>28</sup> Every year Transparency International publishes the Corruption Perception Index (CPI), which is a ranking of countries based on the perceived level of corruption in those countries. The countries' rankings are based on seventeen different polls and surveys of business people, risk analysts, and the general public, conducted by a variety of organizations.<sup>29</sup> The 1999 CPI ranked ninety-nine countries, with Denmark being perceived as the "cleanest" country and Cameroon as the most corrupt. The United States ranked eighteenth in the index, placing it as perceived to be more corrupt than Canada, Singapore, the United Kingdom, and Germany, but less corrupt than Japan, Italy, and Mexico.<sup>30</sup>

Not surprisingly, the CPI created a significant amount of controversy among the countries that ranked low in the index. An outspoken critic of the CPI was Malaysian Prime Minister Mahathir Mohamad. Mohamad argued that the countries that appeared clean in the CPI poll, mostly European and North American countries, were just as much to blame for the level of corruption in the countries at the bottom of the CPI due to clean countries' "exported corruption."<sup>31</sup>

In 1999, Transparency International and Gallup International addressed these concerns by looking at the supply side of corruption. These organizations conducted a survey of almost 800 business executives in fourteen emerging market economies, asking them to rank the likelihood of companies from the nineteen largest exporting countries to pay bribes. The results of this survey created the Bribe Payers Index (BPI).<sup>32</sup> In the BPI, Sweden, Australia, and Canada are perceived to have the "cleanest" corporations, while China, South Korea, Taiwan, and Italy have corporations that are perceived to be the most likely to pay bribes. The United States ranks in the middle of perceived bribe payers.<sup>33</sup>

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27. See JOHN T. NOONAN, *BIBES* (1984).

28. See Transparency International, *Press Release: New Poll Shows Many Leading Exporters Using Bribes* (Oct. 26, 1999) (visited Aug. 26, 2000) <[http://www.transparency.de/documents/cpi/cpi-bpi\\_press-release.html](http://www.transparency.de/documents/cpi/cpi-bpi_press-release.html)>.

29. No country in the index is included in all 17 surveys. A country must be included in at least three surveys to be included in the index. See *id.*

30. See *id.*

31. Greg Steinmetz, *U.S. Firms Appear Among Least Likely to Bribe Overseas*, WALL ST. J., Aug. 25, 1997, at 9A.

32. See *Bribe Payers Survey*, *supra* note 10.

33. Johann Graf Lambsdorff, an economics professor at Goettingen University in Germany and collaborator on the CPI index, conducted an initial attempt to determine which countries' corporations were paying bribes. See *id.* Lambsdorff used a regression analysis to determine the propensity of a certain country's business firms to pay bribes based on their level of exports to corrupt countries, after controlling for other influencing factors, such as language barriers, geographic proximity, and the composition of products traded. This study relies on the assumption that corporations with an inclina-

Table 1 compares both the CPI and BPI rankings of the nineteen countries included in both indexes.<sup>34</sup> Comparing each country's supply of and demand for corruption reveals important variations. Sweden and Canada are the cleanest on both dimensions—they rank the highest on both indexes, while China, South Korea, Italy, and Malaysia have both a high demand for and high supply of corruption. Some countries appear to have a double standard for corruption—discouraging it at home, but engaging in it abroad. For example, Singapore ranks third out of nineteen countries in the CPI but eleventh in the BPI. Conversely, certain countries have corruption at home, but their companies are perceived as less likely to pay bribes in foreign countries. Belgium and Austria stand out as this type of country. The United States, expected to rank highly on the BPI because, until the OECD Convention, it was the only country to criminalize bribery, ranks in the middle of both indexes. In fact, the United States is tied with Germany on the BPI, a country that until recently allowed tax deductions for bribes.<sup>35</sup>

**Table 1: CPI and BPI Rankings**

Country	CPI	BPI	Rankings Move
Sweden	1	1	0
Canada	2	2	0
Singapore	3	11	-8
Netherlands	4	6	-2
Switzerland	5	5	0
Australia	6	2	+4
USA	10	9	+1
France	11	13	-1
Spain	11	12	-1
Japan	13	14	-1
Taiwan	14	17	-3
Belgium	15	8	+7
Malaysia	16	15	+1
Italy	17	16	+1
South Korea	18	18	0
China	19	19	0

The higher the ranking (and the lower the number), the “cleaner” the country.

tion to pay bribes have an advantage over “cleaner” corporations in countries that have a high level of corruption.

His study included the 18 largest exporters and 87 importing countries. This 1997 study found that firms from Belgium (including Luxembourg), France, Italy, and the Netherlands, were the most likely to pay bribes, while Malaysia, Sweden, Austria, Australia, and the United States were the least likely. The most striking difference between this attempt and the BPI is Malaysia's ranking as the most clean in Lambsdorff's study, but one of the most likely to pay bribes in the BPI. Lambsdorff's study also ranked Belgium as having the highest level of bribery, while the BPI has it in the middle. See Jennifer M. Freedman, *Study Shows Bribery An Everyday Element Of World Trade*, DOW JONES ONLINE News, Sept. 8, 1997.

34. See *infra* tbl.1.

35. A comparison of these 19 countries based on their actual scores in the two indexes produces the same results as those discussed above.



## II. An Emerging World View on Corruption and Bribery

Throughout the world, there is evidence of changing attitudes about corruption and bribery. Governments, NGOs, and even the general public are starting to recognize the damage caused by coarse bribery and therefore the need to take aggressive steps to control it. In September 1997, World Bank president James Wolfensohn said: "Only 18 months ago, the word corruption was never mentioned. Today, there is a publicly expressed revulsion, on moral, on social, and on economic grounds."<sup>36</sup> Initiatives by international governmental and non-governmental organizations to combat bribery reflect this emerging worldview. While it remains to be seen if these efforts will be successful or if countries will follow through on their pledges, these efforts do show a recognition that corruption is an issue "that brings the crowds out on to the streets and cannot be ignored by governments or business."<sup>37</sup>

### A. Drivers of the Anti-Corruption Movement

Changes in the global marketplace over the past several years have combined to make bribery and corruption one of the central issues in international business today. Rather than a single cause, the anti-corruption movement appears to have many parents. The following events are some of the likely candidates.

*The Growing Global Marketplace.* The "borderless" global marketplace is bringing national economies and corporations throughout the world into increasingly greater interdependence. The decade leading up to 1996 saw an 80% increase in world trade.<sup>38</sup> Issues that can affect the functioning of effective markets in one region of the world can now affect the entire global market; corruption is finally being recognized as one of those issues.<sup>39</sup> In addition, nations are recognizing that corruption can have a negative impact on the effective functioning of global capital markets and any particular country's access to those markets.<sup>40</sup> Uniform standards of financial reporting and overall transparency are necessary elements of attaining investor confidence in the capital markets. Further, nations are recogniz-

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36. Diane Coyle, *West Targets Third World Corruption*, INDEPENDENT, Sept. 21, 1997, at 14.

37. *Honest Trade*, *supra* note 24, at 22.

38. See Lucinda A. Low & Kathryn Cameron Atkinson, *Led by the U.S., the World Wages War on Corruption*, NAT'L L. J., Mar. 3, 1997, at B14.

39. See Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Towards the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 25 n.150 (1999) (noting the impact of the Asian financial crisis on U.S. and European industries); Walsh, *supra* note 11, at 16 (noting that "[h]ardly anyone paid attention to the cost of corruption when economies grew at double-digit rates, but the economic collapse in Asia has driven home the price everyone pays for such practices").

40. See George et al., *supra* note 39, at 26 (noting how poor governance can lower investor confidence).

ing that corruption lowers foreign direct investment in their country<sup>41</sup> and can rob the country of significant sums in import tax revenue.

*High-Profile Cases.* Many high-profile cases in the 1990s increased the attention placed on corruption. In South Korea, two former presidents were convicted and imprisoned for accepting hundreds of millions of dollars in bribes.<sup>42</sup> In Italy, the Tangentopoli (meaning "bribe city") investigation led to the conviction of a former prime minister.<sup>43</sup> In both Brazil and Venezuela, Presidents were impeached due to bribery charges.<sup>44</sup> Similar cases come from Mexico, Spain, Ecuador, and others.<sup>45</sup> These high-profile cases dramatically demonstrate the seriousness of corruption to all national leaders, policymakers, and the public. They encourage those who would seek to enforce anti-corruption laws or promulgate stronger policies.

*The End of the Cold War.* Although the end of the Cold War brought increased attention to corruption, it also led to greater opportunities for corruption. The collapse of the Soviet Union and socialist governments in Europe allowed policymakers all over the world to focus their attention on other matters, including corruption and its negative consequences.<sup>46</sup> In addition, nations no longer felt the strong pressure to support corrupt governments in order to advance other geopolitical interests.<sup>47</sup> The end of the Cold War also increased the independence of the judges and prosecutors and created a stronger free press.<sup>48</sup> At the same time, paradoxically, the opening up of markets and the privatization of state-owned enterprises increased opportunities for corruption.<sup>49</sup> Further involvement in global trade by countries with high corruption may also contribute to increased instances of coarse bribery.

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41. See *Honest Trade*, *supra* note 24, at 22. Research by Harvard economist Shang-jin Wei shows that corruption is the equivalent of placing a tax on foreign direct investment. See *id.*

42. Guggenheim, *supra* note 21, at A4; Omestad, *supra* note 12, at 22.

43. Omestad, *supra* note 12, at 22.

44. John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, *FOREIGN AFF.*, Sept.—Oct. 1998, at 18.

45. See *id.*

46. See George et al., *supra* note 39, at 22-23; Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 *J. PUB. POL'Y & MARKETING* 108 (1998).

47. See Stuart Marc Weiser, *Dealing with Corruption: Effectiveness of Existing Regimes on Doing Business*, 91 *AM. SOC'Y INT'L L. PROC.* 99, 105-11 (1997) (presenting the comments of Nancy Zucker Boswell). The pressure to support corrupt governments was the result of a "the enemy of my enemy is my friend" approach to foreign policy. See George et al., *supra* note 39; see also Tanzi, *supra* note 5, at 560 (noting the political hypocrisy that led to the overlooking of high-level corruption as long as those leaders were in the right political camp).

48. See Brademas & Heimann, *supra* note 44; see also Tanzi, *supra* note 5, at 560-61 (arguing that the increase of democratic governments and a free press has created an environment where the "discussion of corruption is no longer a taboo").

49. See Tanzi, *supra* note 5, at 563-64. For example, to obtain a low price on companies and real estate formerly owned by the East German government, a German businessman paid \$3.75 million in bribes to an agency official overseeing the privatization. Guggenheim, *supra* note 21, at A4.

## B. International Efforts to Combat Corruption

The confluence of these factors galvanized international efforts to combat bribery and corruption, ranging from multilateral initiatives to uprisings from the local citizenry. The following sections briefly describe examples of these efforts which illustrate an emerging world view that places corruption as one of the central issues of domestic and global policy.

### 1. Multinational Organizations

*Organization for Economic Cooperation and Development.* The most significant advancement in the fight against corruption and the strongest demonstration of its universal condemnation is the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force on February 15, 1999.<sup>50</sup> The Convention requires signatories to criminalize the bribery of any foreign public official and prohibit accounting practices that facilitate the payment or concealment of bribes.<sup>51</sup> The United States amended the FCPA in 1998 to comply with the OECD Convention's stricter provisions.<sup>52</sup> These amendments included expanded definitions of "bribery" and "foreign public official."<sup>53</sup>

The Convention, adopted in 1997, has yet to receive widespread recognition in the private sector. Thirty-eight percent of the executives who responded to Transparency International's 1999 survey stated that they had not heard of the Convention, and another 43% stated that they had "only heard about it," as opposed to knowing something about its provisions.<sup>54</sup> Of the 19% of respondents who were familiar with or at least knew something about the Convention, less than one-fifth reported that their organizations were reviewing their practices in response to the convention.<sup>55</sup>

In January 2000, the OECD released for comment a draft version of its guidelines for multinational enterprises.<sup>56</sup> In addition to chapters on such topics as the environment and industrial relations, the guidelines directly addressed combating bribery.<sup>57</sup> The guidelines not only provide that corporations should not offer or pay bribes, but that they should also establish and disclose compliance systems and employee training programs.<sup>58</sup>

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50. See OECD, *Welcome to the OECD Anti-Corruption Unit* (last modified Sept. 1, 2000) <[www.oecd.org/daf/nocorruption/index.htm](http://www.oecd.org/daf/nocorruption/index.htm)>.

51. Signatories are not required to criminalize "facilitating" payments. See Christopher F. Corr & Judd Lawler, *Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1304 (1999).

52. See George et al., *supra* note 39, at 11.

53. See *id.* at 11-12.

54. See *Bribe Payers Survey*, *supra* note 10.

55. See *id.*

56. See OECD, *The OECD Guidelines for Multinational Enterprises* (last modified Jan. 2000) <<http://www.oas.org/juridico/english/Treaties/b-58.html>>.

57. See *id.* at 13.

58. See *id.*

*Organization of American States (OAS).* The Organization of American States, which consists of thirty-four nations in the Western Hemisphere, adopted the Inter-American Convention Against Corruption in 1996.<sup>59</sup> This agreement requires all signatories to criminalize bribery by adopting laws that are the "rough equivalent" of the FCPA.<sup>60</sup> In many ways, however, the Convention goes beyond the FCPA's provisions. The Convention provides for financial disclosure and transparency in accounting practices, as well as asset seizure, extradition, and international cooperation in the collection of evidence.<sup>61</sup>

*Council of Europe.* The Council of Europe, which currently has 41 member nations,<sup>62</sup> established the Multidisciplinary Group on Corruption (GMC) in September 1994.<sup>63</sup> In 1998, the GMC established the Group of States Against Corruption (GRECO) to monitor the implementation of the Guiding Principles for the Fight against Corruption, which had been adopted by the Committee of Ministers of the Council of Europe in 1997.<sup>64</sup> GRECO's monitoring role includes reviewing member states' efforts in furtherance of the Guiding Principles and issuing public statements if a member state "remains passive or takes insufficient action" with respect to the Principles.<sup>65</sup> The public disclosure approach is consistent with GRECO's statement that the "means of mutual evaluation and peer pressure" allow "flexible and efficient" monitoring of the Guiding Principles.<sup>66</sup> In addition, the Council of Europe has recently passed the Criminal Law Convention on Corruption.<sup>67</sup>

*United Nations.* In 1996, the UN General Assembly adopted the Declaration against Corruption and Bribery in International Transactions.<sup>68</sup> The declaration calls for countries to eliminate tax deductions for bribes and to criminalize bribery. It also encourages cooperation between countries in sharing information necessary for criminal investigations and

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59. *Inter-American Convention Against Corruption*, Organization of American States, Third Plenary Session (Mar. 29, 1996) <<http://www.oas.org/juridico/english/Treaties/b-58.html>>.

60. See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 234 (1997).

61. See *id.*

62. See Council of Eur., *About the Council of Europe*, (visited Feb. 10, 2001) <<http://www.coe.fr/eng/present/about.htm>>.

63. See Council of Eur., *Council of Europe's Fight Against Corruption and Organised Crime* (visited Sept. 20, 2000) <<http://www.coe.fr/corruption/epresent.htm>>. The acronym GMC, *Le Groupe Multidisciplinaire sur la Corruption*, is from the French translation of "the Multidisciplinary Group on Corruption."

64. Committee of Ministers, *Agreement Establishing the Group of States Against Corruption (GRECO)*, 102nd Session, May 4-5, 1998 (visited Feb. 10, 2001) <<http://www.doj.gov/criminal/fraud/fcpa/E2198.htm>>.

65. *Id.* art. 16.

66. *Id.*

67. Council of Eur., *Criminal Law Convention on Corruption* (Jan. 27, 1999) <<http://www.coe.fr/eng/legaltxt/173e.htm>>.

68. *United Nations Declaration Against Corruption and Bribery in International Transactions*, G.A. Res. 51/191, U.N. 9AOR, 51st Sess., Supp. No. 49, Annex, Agenda Item 12, U.N. Doc. A/51/49 (1996).

other legal proceedings.<sup>69</sup>

*IMF and World Bank.* Traditionally, the International Monetary Fund (IMF) and the World Bank attempted to avoid any involvement in a country's internal politics.<sup>70</sup> In the 1990s, however, they realized that abstention was no longer a feasible approach to attaining their objectives. For example, the World Bank estimated that 20-30% of its lending to Indonesia went to corrupt officials.<sup>71</sup> In response, both organizations have taken active measures to reduce corruption. For example, the IMF and World Bank suspended over \$290 million in loans to Kenya, a country with numerous alleged corruption scandals.<sup>72</sup>

In 1997, the World Bank adopted guidelines on preventing bribery in Bank projects.<sup>73</sup> The guidelines concern not only borrowers and bidders on Bank loans, but also contractors and suppliers involved in the performance of Bank-supported contracts. If the Bank determines that corruption or fraudulent practices have occurred, possible sanctions include: rejection of an existing bid, loss of any remaining funds allocated for previously-granted contracts, and, for a specified period of time, ineligibility for future World Bank-financed contracts.<sup>74</sup> The guidelines also require a contract provision granting the World Bank the right to inspect the accounts and records of all parties involved in a Bank-supported contract and to have them audited by Bank-appointed auditors.<sup>75</sup>

## 2. International Non-Governmental Organizations

*International Chamber of Commerce (ICC).* In 1977, the International Chamber of Commerce became the first non-governmental organization to establish rules of conduct relating to bribery. The ICC also established a panel to oversee the application of the rules of conduct,<sup>76</sup> provide interpretations of the rules, and hear alleged infringements.<sup>77</sup> If a firm thought that a competitor was engaging in corrupt practices, that firm could request an investigation by the panel. The basic idea was for the business community to enact self-regulation and enforce it, although the ICC contemplated no specific sanctions. After seventeen years, the panel had only

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69. See *id.*

70. See Omestad et al., *supra* note 12, at 22.

71. See *Honest Trade*, *supra* note 24, at 22.

72. See Omestad et al., *supra* note 12, at 22. It was alleged that twenty percent of the Kenyan government's annual spending (approximately \$400 million) went to subsidize a business's exporting of gold and diamonds to Switzerland, even though Kenya has no gold or diamond resources. *Id.* Other allegations include bribes paid for the evasion of import duties. *Id.*

73. World Bank, *Preventing Corruption in Bank Projects: Procurement Guidelines*, (visited Feb. 10, 2001) <<http://www.worldbank.org/publicsector/anticorrupt/preventing.htm>>.

74. See *id.*

75. See *id.*

76. See Weiser, *supra* note 47, at 99 (presenting the comments of Francois Vincke, chair of the ICC's 1994 ad hoc committee on bribery).

77. See *id.*

heard one case before it, and it was officially disbanded.<sup>78</sup>

In 1995, an ICC committee issued a report establishing new corporate rules of conduct and providing recommendations to governments and other international organizations. These rules of conduct go beyond the FCPA's provisions by prohibiting any form or technique of bribery and by not making a distinction between public officials and private persons as the recipients of bribes.<sup>79</sup> The rules recommend that corporations adopt their own codes of conduct based on the ICC's rules, but adapted to their particular situation. These rules were updated in 1999, and those provisions are discussed below.<sup>80</sup>

*Caux Roundtable.* The Caux Roundtable is an international organization of more than 250 business leaders from over twenty-five countries. In 1994, the Roundtable published its Principles for Business to establish an international standard for responsible corporate behavior. Since their publication, the Principles have gained widespread support in North America, Europe, and Japan.<sup>81</sup> One of the seven general principles of business adopted by the members of the organization is the "avoidance of illicit operations," which states in part that "[a] business should not participate in or condone bribery, money laundering, or other corrupt practices: indeed, it should seek cooperation with others to eliminate them."<sup>82</sup>

*Transparency International.* Transparency International (TI) is an international non-governmental organization established in 1993 to combat corruption. TI now has chapters in over sixty countries, with its main office in Berlin. The 1999 International Anti-Corruption Conference, held in South Africa with TI as the secretariat, drew 1600 delegates from 135 countries.<sup>83</sup> At the meeting, the delegates adopted a resolution encouraging the full implementation of the OECD convention and calling for enforceable international conventions to reduce money laundering and facilitate the return to developing countries any money illegally obtained by corrupt public officials. Transparency International official Nancy Zucker Boswell stated that this was a dramatic change from 1993, when "few governments or institutions would openly confront the issue of corruption."<sup>84</sup>

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78. See *id.* at 101. Vincke believes that the panel failed because corporations believed in having either a self-regulatory approach or a judicial approach but not both. The business community considered the panel a quasi-judicial process and therefore never completely accepted it. See *id.*

79. See Vincke, *supra* note 8, at 12.

80. See *infra* Part IV.C.

81. See Caux Roundtable, *Principles for Business* (visited Dec. 22, 2000 <[www.cauxroundtable.com/PRIN4.htm](http://www.cauxroundtable.com/PRIN4.htm)>).

82. See Caux Roundtable, *Principles for Business* (visited Dec. 22, 2000) <<http://www.cauxroundtable.org/ENGLISH.HTM>>.

83. See Transparency Int'l, *Press Release, Anti-Corruption Conference Ends with Call for International Mechanisms to Recover Looted Money* (Oct. 15, 1999) <[http://www.transparency.de/documents/press-releases/1999/1999.10.15.durban\\_commitment.html](http://www.transparency.de/documents/press-releases/1999/1999.10.15.durban_commitment.html)>.

84. Nancy Zucker Boswell, *The Law, Expectation, and Reality in the Marketplace: The Problems of and Responses to Corruption*, 30 LAW & POL'Y INT'L BUS. 139 (1999).

### C. Public Uprising Against Corruption

Perhaps the most significant of the anti-corruption efforts and trends is the fact that the general public appears to have lost its tolerance for corruption and bribery. Recent articles in leading newspapers and magazines show these strong attitudes. The *Los Angeles Times* reports, "Corruption, Not Revolutions or Coups, Topples Governments These Days,"<sup>85</sup> while the *Economist* reports that "corruption is now an issue that brings the crowds out on to the streets."<sup>86</sup> In the 1990s, national governments in Italy, Brazil, Pakistan, and Zaire fell, in part due to public uprising against corruption.<sup>87</sup> This disapproval demonstrates that, contrary to the apparent beliefs of many businesspersons operating in less developed regions of the world, corruption is not a publicly accepted fact of life.

In the U.S., the government's enforcement of the FCPA reflects the public's condemnation of bribery. Between 1977 and 1995, the Department of Justice (DOJ) brought only sixteen prosecutions for bribery under the FCPA.<sup>88</sup> In 1998, however, it was estimated that the DOJ had over seventy-five cases under investigation.<sup>89</sup> In 1995, a regional vice-president of Lockheed became the first person jailed for a FCPA violation. In 1996, the Securities and Exchange Commission (SEC) filed its first civil enforcement action of the FCPA in ten years; this was soon followed by others.<sup>90</sup>

The investment community is also taking a stand against corruption. Noted corporate law attorney Ira Millstein recently stated that there is a market-based movement against corruption.<sup>91</sup> He finds that investors and lenders are making investment decisions based on the country or region's record for transparency, corruption, and bribery. Due to their large size, investors such as pension funds require a well-diversified portfolio, including international securities. Accordingly, these investors are "using their capital to demand good governance."<sup>92</sup>

This result is consistent with the idea that moral desires are embodied in capital, consumer, and labor markets. The notion of "morality in markets" results from the aggregate expressions of participants' moral desires in their choices as consumers, investors, and job-seekers. The recent growth in socially screened mutual funds, social cause marketing by consumer product firms, and human resources programs that allow employees to engage in volunteer or pro bono work reflects that people are influenced by their moral desires in economic transactions. Sometimes groups of individuals target particular firms as symbols of their concerns. For example, Monsanto has become the object of protests and boycotts pertaining to

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85. Guggenheim, *supra* note 21, at A4.

86. Honest Trade, *supra* note 24, at 22.

87. *See id.*

88. *See* Jonny J. Frank & Wendy C. Schmidt, *Steering Clear of the Bribery Trap When Buying Abroad*, 33 MERGERS & ACQUISITIONS 39, 41 (1998).

89. *See id.*

90. *See* Hotchkiss, *supra* note 46, at 110-11.

91. *See* ICC, *Investors Demand Good Corporate Governance Free of Corruption* (last modified Feb. 29, 2000) <<http://www.iccwbo.org>>.

92. *Id.*

genetically modified seeds.<sup>93</sup>

Thomas Dunfee has recently argued that the existence of morality within markets creates specific obligations for corporate management:

1. There is a presumption that all corporate actions must be undertaken to maximize shareholder wealth;

2. Managers must respond to existing marketplace morality and anticipate changing marketplace morality that may have a negative impact on shareholder wealth;

3. The presumption in principle 1 may be rebutted where clear and convincing evidence exists that marketplace morality would justify a decision that cannot be shown to maximize shareholder wealth directly; and

4. Managers must act consistent with hypernorms (manifest universal norms and principles).<sup>94</sup>

Obligation 2 is most salient in the context of firms devising strategies to combat bribery. When managers fail to anticipate changing moral attitudes within the markets they serve and use, they may end up making decisions that will have a negative impact on shareholder wealth. This happened to the tobacco companies when they failed to appreciate changing attitudes about marketing cigarettes to children,<sup>95</sup> Shell Oil when it failed to understand the non-scientific environmental concerns regarding its plans to sink an old oil rig in the North Sea,<sup>96</sup> and Nike when it failed to appreciate and respond promptly to customer concerns that its shoes and apparel were produced under sweatshop conditions.<sup>97</sup>

For our purposes, the issue is whether the apparently changing public attitudes about corruption will ultimately play out in the same manner as the changing attitudes about tobacco markets, the environment, and child labor. If so, firms associated in the public's mind with bribery may suffer. As with these other issues, some firms may face greater negative exposure. In industries such as arms, defense, and public works construction where public officials allocate large value projects, there is greater vulnerability to pressure from corrupt payments.<sup>98</sup> Companies in this set that appear cavalier about corrupt practices may be particularly susceptible to public disapproval. The confluence of interest among governments, international public organizations, non-governmental organizations, and professional groups signals a potentially powerful wave of public opinion. Managers who fail to anticipate this change do their shareholders great disservice.

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93. See Youssef M. Ibrahim, *Genetic Soybeans Alarm Europeans*, N.Y. TIMES, Nov. 7, 1996, at D1.

94. See Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROBS. 129, 149 (1999).

95. See THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 90 (1999).

96. See *id.* at 188.

97. See David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 45 n.22 (1999).

98. See *Bribe Payers Survey*, *supra* note 10 (reporting survey results showing that defense and public works sectors are the most likely to have high levels of corruption).



### III. Understanding the Paradoxes of Corruption and Practice

As illustrated above, coarse bribery is paradoxical for several reasons. There is a growing movement against the practice, yet there is no hard evidence that the level of corruption is declining—and it may even be increasing. Firms aggressively seek to prevent the corruption of their own employees while simultaneously approving of attempts to corrupt the employees of potential suppliers. Firms from countries that have reputations for being relatively clean of corruption are thought to be major sources of corruption in other countries. This section will evaluate alternative explanations for these paradoxes.

This section considers four possible explanations for behavior supporting persistent corruption. First, the behavior may be explained by competitive necessity; engaging in selective corrupt payments can be seen as a sensible business strategy. Second, making corrupt payments may be explained by widespread extortion. Third, a non-trivial amount of corrupt payments may be due to the independent actions of employees who act contrary to the announced policies of their employers. Finally, bribe payers may view payments as ethically justified because they respect local culture and avoid moral imperialism.

#### A. Competitive Necessity

Conversations with managers produce anecdotal evidence supporting the proposition that, in particular cases, making corrupt payments is essential to success in certain markets. Testimony in support of liberalizing the Foreign Corrupt Practices Act in 1988 emphasized that U.S. businesses were at a competitive disadvantage because of the Act's enforcement.<sup>99</sup>

Ultimately, whether bribery is justifiable as a competitive strategy is a factual claim. Some firms argue that they have a competitive advantage because they have a reputation for not paying bribes. For example, firms such as General Electric and Honeywell may be able to obtain contracts not available to others and may have lower costs due to the avoidance of payments.<sup>100</sup> Similarly, if a firm such as Coca Cola, which has a reputation for eschewing the payment of bribes, either refuses to come into a particular market or leaves without a sound business reason, those actions are a signal that the local officials are corrupt.<sup>101</sup>

Evidence regarding the overall status of the competitive necessity claim is mixed,<sup>102</sup> and it is difficult to obtain definitive data because of the

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99. See Salbu, *supra* note 60, at 243; see also *id.* at 255-57 (presenting the arguments of those claiming the FCPA puts U.S. businesses at a comparative disadvantage).

100. See Business for Soc. Responsibility (visited Nov. 10, 2000) <<http://www.bsr.org/resourcecenter/index.html>>.

101. See Frank Vogl, *Curbing Corruption: Making Progress with the Bribe-Givers*, 3 ECON. PERSPECTIVES (Nov. 1998) <<http://www.usinfo.state.gov/journals/ites/1198/ijee/vogl.htm>> ("What leader in any country is willing to risk a public announcement by Coca-Cola that it is quitting the country rather than pay a fat bribe to the head of state? So far, none.").

102. See Thomas W. Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. MARKETING 14 (1999).

secrecy that surrounds coarse bribes. However, two conclusions appear warranted. First, there may be specific situations where making a payment increases short-term profit for the bribe-paying firm. Second, the massive amounts of bribery that apparently exist produce serious cooperation problems for certain firms. If firms do not make the payments, they will be seriously hurt in a particular market. Yet, if they do, they are contributing to the continuation of a system that works to disadvantage them. From the perspective of these firms, criminalizing corrupt payments helps provide a level playing field.

As an important caveat, even if competitive necessity requires the payment of a bribe in a particular instance, it will not suffice as a full ethical justification. Similarly, a defense of competitive necessity would not justify a dangerous and unsafe workplace. The major issue, however, discussed at length in the last section, is whether there are voluntary actions that firms may take, singly or in cooperation with others, to resolve this cooperation problem and thereby reduce the chances that other firms will "defect" and pay bribes to gain a competitive advantage. Also, consumers and investors may be increasingly willing to punish firms that are perceived as corrupt by boycotting their products or shares. If this becomes the case generally, then making corrupt payments may cease to be a viable competitive strategy.

## B. Extortion

Some instances of bribery result from direct personal threats of physical harm to the bribe-payer or her family. As James Lindgren notes, "Although the morality of giving in to a coercive extortion threat has been debated for centuries, capitulating is often not illegal."<sup>103</sup> Nonetheless, giving in to extortion nonetheless is a violation of the Model Penal Code.<sup>104</sup> Thus, the dispute as to the ethical culpability parallels the debate in the law.

The morality of making extorted payments depends on the nature of the threat and the circumstances surrounding the payment. Even though it may be inappropriate to expect moral heroism on the part of managers, a certain amount of moral courage should be exercised.<sup>105</sup> Despite Scott Turow's warning that "bribery can be justified only if the bribe-giver is truly without alternatives,"<sup>106</sup> there have been widely reported cases of murders and other threats that have occurred within an environment involving corrupt payments.

The problem exists in part because the extortion often cannot complain to a legitimate authority. Complaining to the local police is not a satisfactory option where the police are in league with those extorting the payments. Instead, as discussed later, a credible body is needed, whose

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103. James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1698 (1993).

104. See MODEL PENAL CODE § 2.40.1 (1990).

105. Dunfee, *et al.*, *supra* note 102, at 25.

106. Scott Turow, *What's Wrong with Bribery*, 4 J. BUS. ETHICS 249, 251 (1985).

integrity is unquestioned and whose intervention can be predictably invoked.

Presumably, extortion explains only a very small number of corrupt payments. Extortion exists in part because systemic coarse bribery provides the opportunity for the use of force. Here, in particular, eradicating the demand side of the practice requires the effective rule of the criminal law.

### C. Rogue Employees

Many firms have recently strengthened and expanded internal compliance and auditing systems designed to detect and discourage corrupt payments.<sup>107</sup> In addition, many have expanded ethics programs to assist employees in dealing with these issues.<sup>108</sup> For example, many firms have installed "help lines," where employees can call, often anonymously, to obtain advice on how to handle certain recurring situations.<sup>109</sup>

Implicit in these changes is the assumption that some employees, freed from monitoring and effective controls, may be tempted to arrange corrupt payments to get business for the firm. Presumably, the personal incentive for rogue employees would be increased recognition or compensation from the firm as a result of obtaining or retaining business through the corrupt payments. This phenomenon could be called the "bad apple in the good barrel." The firm desires that no payments be made, but it is unable to control remote employees who are unable to resist the personal incentives to pay bribes.

An alternative explanation illustrates the "good apple: the bad barrel" phenomenon. Under this view, some firms appear hypocritical. They state publicly that they have an anti-bribery policy and have provisions in their codes of ethics that condemn improper payments. Yet, at the same time, their internal compensation systems reward employees who produce business, regardless of how the employees get their results. These circumstances suggest that senior managers overlook the payment of bribes and turn a blind eye to anything suspicious; the firm compensates employees solely on the basis of results. Such incentive schemes put pressure on employees to produce, thereby creating a morally ambiguous environment where employees are not certain how to act. This environment may seduce reluctant employees into making improper payments.

For both possibilities, the solution seems clear. Firms must make a genuine, strong commitment to controlling corrupt bribes, align incentives and evaluations to reflect the firm's policies, review compensation systems to make sure they do not provide incentives for bribes, and implement financial and management controls designed to lessen the chances that

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107. See, e.g., Patrick J. Head, *The Development of Compliance Programs: One Company's Experience*, 18 Nw. J. INT'L L. & BUS. 535 (1998) (explaining the experiences of the FMC Corporation).

108. See *Dealing with Bribery & Corruption: A Management Primer* (1999) (on file with authors) (explaining the efforts at Shell).

109. See *id.* at 20.

bribe payments will pass undetected. Successful firms should be highly capable of implementing these policies.<sup>110</sup> A persistent failure to do so raises questions as to whether it is actually a "bad barrel" that is producing the "bad apples."

#### D. Ethical Justifications for Paying Bribes

One possible explanation for bribery's prevalence is that many people sincerely believe the practice is ethically justified.<sup>111</sup> Many managers have made these claims over the years. Based on anecdotal experience, a plausible case can be made to justify bribery under well-established theories in business ethics.

For example, can a consequentialist analysis, which considers an action desirable if it produces overall good consequences, be used to support some forms of bribery?<sup>112</sup> The judgment can be made with regard to a particular bribe payment, or a system of bribery within a political or economic system. In the former, one could evaluate the consequences in reference to the single payment. In the latter, one could estimate the overall impact of recurring patterns of bribery within a country. In both instances, one must estimate the impact on all those directly affected.

Positive consequences accruing to the bribe-payer from coarse bribes may include increased profits, increased employment, and greater security for the bribe-payer's creditors. The bribe-receiver gains the value of the bribe payment itself. In a very corrupt society, the bribe may even overcome inefficient government regulation and provide a more efficient allocation of resources.

Offsetting these positive consequences are a host of potential negative consequences.<sup>113</sup> There is an overall inefficient allocation of resources where decisions are based on personal benefit to the bribe-receiver, not political rules or markets. Further, the secrecy of bribery may reduce the value of price information. Philip Nichols takes an extremely hard line, arguing that bribery may diminish the happiness of the citizenry, reduce

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110. Cf. Timothy L. Fort & James J. Noone, *Gifts, Bribes, and Exchange: Relationships in Non-Market Economies & Lessons for Pax E-Commercias*, 33 CORNELL INT'L L. J. 515 (2000) (discussing a naturalist role for corporations to serve as mediating institutions for controlling problematic behaviors and implying that it may be necessary for the corporation to focus on subunits within the organization while at the same time providing all members of the organization with a clear understanding of the justifications for an anti-bribery policy).

111. No current survey data supports this opinion. Any survey attempting to identify such viewpoints would be seriously constrained by respondents seeking to provide socially desirable answers. Believing that bribery is widely condemned and therefore assuming that those conducting the survey want to hear a condemnation of bribery, individuals who personally believe that bribery is ethical may not be likely to say so. There are techniques that could be used to control for this social desirability effect, but they would have to be carefully employed.

112. For a brief description of consequentialism, see JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 107-21 (3d ed. 1999).

113. See Dunfee et al., *supra* note 102, at 23-28.

the credibility and efficiency of government, and increase lawlessness.<sup>114</sup> For example, bribery often requires some manipulation of a firm's financial reports. If this is sufficiently widespread, individuals may lose confidence in the reliability of financial statements. This in turn can have a serious deleterious effect on capital markets. As U.S. Secretary of State Madeline Albright stated: "Corruption is not capitalism's natural product, but its perversion."<sup>115</sup>

Examples given in the first section of this article lend credence to these claims.<sup>116</sup> Where bribery results in officials ignoring environmental and safety regulations, individuals may be physically harmed as a result of the ensuing hazards. The extreme result is the well-publicized case of the Chinese "bean curd bridges." In China, the state bank financed projects designed to improve the infrastructure and boost the economy, but the projects were so riddled with corruption that bridges, buildings, dikes, roads, and other works collapsed almost as soon as they were completed, killing and injuring hundreds of people.<sup>117</sup>

The emerging view today is that in most cases the negative consequences of bribery dominate the positive effects, often leading to lower economic growth and sub-optimal government spending.<sup>118</sup> Thus, a rule consequentialist, who devises rules based on probable outcomes in lieu of making calculations for every decision, would devise a rule forbidding corrupt payments. On the other hand, as Ronald Green suggests, there may be specialized circumstances, particularly where the negative impact of not paying is large for the bribe payer and the overall impact on others of making the payment is not great, where an act consequentialist may justify a bribe.<sup>119</sup>

However, as Dunfee, Smith, and Ross suggest, it is difficult to apply act consequentialist analysis to bribes.<sup>120</sup> In addition to serious problems with forecasting the likely effects of bribery, there is a daunting problem of commensurability. Some costs, such as the loss of trust in a society or the loss of credibility in financial documents, may be virtually impossible to

114. See Phillip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 337-43 (1997).

115. Nora Boustany, *Anti-Vice Vice President*, WASH. POST, Feb. 26, 1999, at A24.

116. See *supra* Part I.A.

117. See Henry Chu, *China May Be Heading Down Road to Ruin*, L.A. TIMES, Mar. 1, 1999, at A1 (commenting that in one month, two bridges collapsed in different parts of China, killing over 40 people and leading to the arrest of project officials); John Pomfret, *Flimsy Bridges of Qijiang County: Corruption and Incompetence Causing China's Infrastructure to Crumble*, WASH. POST, Apr. 4, 1999, at A11 (stating that in the metropolis of "Chongqing alone last year, 1,600 people died because of shoddy work on construction sites or collapsing infrastructure projects, causing more than \$ 7.3 million in damage").

118. See Cheryl W. Gray & Daniel Kaufman, *Corruption and Development*, 35 FIN. & DEV. 7, 8 (1998) (arguing that the claimed benefits of bribes do not outweigh the costs); Paolo Mauro, *Why Worry About Corruption?*, IMF ECON. ISSUES SERIES 9-12 (1997) (reviewing empirical evidence); see also Mauro, *supra* note 19, at 11 (discussing corruption's influence on government spending).

119. See Ronald M. Green, *When Is 'Everyone's Doing It' a Moral Justification?*, 1 BUS. ETHICS Q. 75 (1991).

120. See Dunfee et al., *supra* note 102, at 23-24.

compare to direct monetary benefits such as the projected profit on a particular contract. Because of these serious problems, it is unlikely that one can genuinely rely on either type of consequentialist analysis to justify a policy of regularly making corrupt payments.

Alternatively, deontological analysis may justify a pattern of bribery. A deontic analysis focuses on whether there has been an intentional violation of a binding moral duty.<sup>121</sup> In the case of a bribe payer, there must be some binding duty that either condemns or justifies a pattern of bribery. A possible justifying duty is that one should respect the cultural norms of other countries. Bribery is often associated with cultural patterns, and its form varies substantially across cultures.<sup>122</sup> Various cultural names such as *guanxi*,<sup>123</sup> *blat*,<sup>124</sup> and *bakshish*<sup>125</sup> identify the practice in certain countries or areas of the world. Although claims are often made for cultural justifications of bribery, it is difficult to build a case for the cultural acceptability of coarse public sector corruption. Noonan claims that every country criminalizes bribery in some form.<sup>126</sup> The fact that coarse corruption is typically kept secretive implies a lack of true cultural acceptance.

In addition, there are other duties that require bribes not to be paid. The bribe-receiver will often take the payment in return for violating a legal duty or the terms of an employment contract. The bribe-receiver is often an agent who owes a duty to a principal to act in a certain way.<sup>127</sup> The payment, which causes the bribe-receiver to act inconsistently with that duty, therefore represents an alienation of agency. These more specific duties often trump any broader duty to respect local culture and result in an ultimate condemnation of coarse bribery. Thus, it is difficult to sustain a deontological case for bribery.

A third alternative, an ethical analysis based on social contracts, obtains the same result. Under this approach, bribery is unethical if it violates relevant community norms or is inconsistent with manifest universal ethical principles one would expect rational actors to adopt for all communities.<sup>128</sup> The basis of the social contract approach is to identify the authentic norms of relevant communities that would apply to a given business decision. If these local norms do not violate manifest universal ethical principles, they constitute a source of moral obligation. Thus, if a host

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121. For a brief description of deontology, see RACHELS, *supra* note 112, at 122-42.

122. See Thomas Donaldson & Thomas Dunfee, *When Ethics Travel: The Promise and Peril of Global Business Ethics*, 41 CAL. MGMT. REV. 45 (1999); Jeffrey A. Fadiman, *A Traveler's Guide to Gifts and Bribes*, 64 HARV. BUS. REV. 122 (1986).

123. See Anna M. Han, *Hong Kong's Economy Under Chinese Rule: Prosperity and Stability?*, 22 S. ILL. U. L.J. 325, 335 (1998).

124. See Sheila M. Puffer & Daniel J. McCarthy, *Business Ethics in a Transforming Economy: Applying the Integrative Social Contracts Theory to Russia*, 18 U. PA. J. INT'L ECON. L. 1281, 1297-98 (1997).

125. See Dove Israeli, *Business Ethics in the Middle East*, 16 J. BUS. ETHICS 1555, 1557 (1997).

126. See NOONAN, *supra* note 27, at 702.

127. See DONALDSON & DUNFEE, *supra* note 95, at 224-26.

128. See DONALDSON & DUNFEE, *supra* note 95, at 25-47 (presenting the Integrative Social Contracts Theory).

community had norms supporting the payment of bribes, it might serve as an ethical justification for bribery.

However, applying a social contract analysis ultimately demonstrates that coarse bribery is unethical. Thomas Donaldson and Thomas Dunfee argue that it is rare to find an authentic pro-coarse bribery norm within a local community.<sup>129</sup> Claims that community members accept a system of bribery fly in the face of the secrecy typically surrounding bribes. Even if the norm were authentic, it likely would be limited to a relatively small sub-community of bribe-payers and corrupt public officials. Such a "pro-bribe" community would almost invariably exist within a much larger community holding a contrary anti-bribery norm. After all, the members of these larger communities bear the negative consequences of bribes in the form of less efficient government and capital markets.<sup>130</sup>

When members of two communities with conflicting norms conduct a transaction, it is necessary to determine which norm should predominate. Typically, the norms of the broader anti-bribery community should have priority over the norms of the smaller pro-bribery community. Donaldson and Dunfee suggest that one rule of thumb for deciding among conflicting community norms in a transaction is whether one of the communities has adopted a prioritization rule.<sup>131</sup> The Foreign Corrupt Practices Act, so long as it represents an authentic norm for the United States, is an example of a prioritization rule. Thus, a firm from a country with extraterritorial legislation of this type would have an additional ethical obligation, based upon a consideration of extant social contracts, to eschew paying a bribe. This duty would occur even though the company might reasonably estimate that its bribe payment would not be discovered or successfully prosecuted.<sup>132</sup>

Even if a pro-bribery community norm had priority, it would still have to be tested against manifest universal principles. Donaldson and Dunfee argue that coarse public sector bribery, even in rare situations where it might be supported by local community norms, violates manifest universal ethical principles whenever it contributes to human endangerment or the substantial diversion of public resources.<sup>133</sup> Concepts of justice and human rights require condemnation of practices that make it impossible for a country to provide the social goods necessary for minimal standards of living.<sup>134</sup> Supporting this conclusion, a World Bank survey indicates that bribery is one of the greatest obstacles to growth and development in developing countries.<sup>135</sup>

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129. See *id.* at 224-26.

130. See *supra* Part I.A.

131. See DONALDSON & DUNFEE, *supra* note 95, at 185-86.

132. Community norms for resolving priority should be applied, so long as they do not have significant adverse effects on other individuals or communities. See *id.* at 185.

133. See *id.* at 226-30.

134. See *id.*

135. See AYMO BRUNETTI ET AL., INSTITUTIONAL OBSTACLES TO DOING BUSINESS: REGION-BY-REGION RESULTS FROM A WORLDWIDE SURVEY OF THE PRIVATE SECTOR (World Bank Policy Res. Working Paper No. 1759 1997) (providing region-by-region results that indicate

Thus, none of the standard approaches recognized by today's business ethicists provide an ethical justification for coarse bribery. Accordingly, it does not appear reasonable that ethically informed businesspeople may believe that they are doing the right thing by consistently paying bribes to corrupt officials.

#### IV. Seeking a Principled Solution to the Paradox of Bribery

The growing dichotomy between practice and opinion raises difficult issues for firms that are either trapped in a cycle of paying bribes or find themselves subjected to extortionist threats for payments. It also raises the stakes for firms that have devoted insufficient attention to controlling the behavior of potential rogue employees. The issue goes beyond a question of ethical behavior; managers may be neglecting their fiduciary duty to shareholders if they fail to control corrupt payments.

This article focuses on individual firms and the steps they might take to combat corruption. Individual firm action is a vital component of the ultimate mix of policies and strategies that are likely to make a significant difference in the practice of corrupt payments.<sup>136</sup> Firms will become truly serious about the problem only when they have internalized anti-corruption values; only when the idea of resisting corruption is part of the firm's core values will it be likely to control the phenomenon successfully. If the pressure to control bribes is seen as compliance with an external source such as the government, then firms may only be half-hearted in their control efforts.<sup>137</sup>

##### A. Sullivan-Type Principles for Multinational Corporations

Firms need a unilateral solution that would alleviate the coordination problem facing them as a result of potential defections from an anti-bribery regime. Specifically, a firm's use of the Sullivan-type principles approach, coupled with the new alternatives for social reporting and auditing, can significantly contribute to the reduction of global corruption. This Article focuses on the C<sup>2</sup> Principles (for Combating Corruption).

Codes of conduct and sets of principles guide how corporations conduct their business at home and abroad. Almost all corporations have internally developed codes of conduct that govern issues such as discrimination, worker safety, and illicit payments. These codes vary greatly from corporation to corporation, both in their specific provisions and means of implementation. In addition to individually developed corporate codes,

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corruption is one of the greatest obstacles to investment in developing countries). The European Bank for Reconstruction and Development also recently identified corruption as one of the greatest obstacles to economic growth in former communist bloc countries. See Stefan Wagstyl, *EBRD Singles Out Corruption as a Big Obstacle to Progress*, FIN. TIMES, Nov. 9, 1999, at 11.

136. The role of firms as "mediating institutions" in dealing with corruption is discussed at length in Fort & Noone, *supra* note 110.

137. See Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106, 109-11.



outsiders have proposed sets of principles corporations should adopt to guide their behavior in morally troubled contexts.<sup>138</sup> Well-known examples include the Sullivan Principles on doing business in South Africa<sup>139</sup> and the MacBride Principles for conducting operations in Northern Ireland.<sup>140</sup> Other codes exist with respect to businesses' impact on the environment<sup>141</sup> and human rights.<sup>142</sup>

In addition to guiding corporate behavior, these principles promote a unified course of action against particular problems. Working from these models, this Article proposes a uniform set of C<sup>2</sup> Principles to guide corporate behavior and assist in combating corruption and bribery. The C<sup>2</sup> Principles act as a voluntary public pledge against bribery, as well as a basis for external monitoring of corporate behavior. Before describing these principles in greater detail, this section briefly discusses the history of the Sullivan Principles.

In 1971, Reverend Leon H. Sullivan, a Baptist Pastor in Philadelphia and member of the General Motors board of directors, attempted to persuade General Motors to divest from South Africa due to the government's apartheid policies.<sup>143</sup> Because he could not win the other directors' support, Reverend Sullivan established the Sullivan Principles in 1977 to help promote racial equality in South Africa through the influence of large corporations. The original set of six principles was a voluntary code designed to guide the practices of U.S. corporations doing business in South Africa. These principles covered equality in hiring and pay, non-segregation in the workplace, training and promotion of blacks, and the improvement of the quality of life of employees outside the workplace.<sup>144</sup>

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138. For a critique of the use and development of codes of conduct in the area of international business ethics, see Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327 (1994).

139. John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 477 (2000).

140. For a discussion of the MacBride Principles, see generally Kevin A. Burke, *Fair Employment in Northern Ireland: The Role of Affirmative Action*, 28 COLUM. J.L. & SOC. PROBS. 1, 10-13 (1994).

141. For a discussion of the Valdez Principles, now known as the CERES Principles, see generally Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 470-75 (1997); Valerie Ann Zondorak, *A New Face in Corporate Environmental Responsibility: The Valdez Principles*, 18 B.C. ENVTL. AFF. L. REV. 457 (1991).

142. Principles concerning human rights include the Slepak Principles for doing business in the former Soviet Union and the Miller Principles concerning business relationships with the People's Republic of China and Tibet. See Jorge F. Perez-Lopez, *Promoting International Respect for Worker Rights Through Business Codes of Conduct*, 17 FORDHAM INT'L L.J. 1, 12-19 (1993).

143. See *id.*

144. The original six principles stated:

1. Non-segregation of the races in all eating, comfort and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.

Included with the principles was a system to evaluate a corporation's compliance. This system required corporations to file reports with Reverend Sullivan, submit to audits by a public auditing firm, and provide information on the firm's performance to its employees.<sup>145</sup> With this disclosed information, the consulting firm of Arthur D. Little compiled and published reports comparing the performance of the signatory firms.<sup>146</sup> Corporations were ranked as "making good progress," "making progress," or "needs to become more active."<sup>147</sup> However, Arthur D. Little did not disclose its grading methods, which raised some skepticism about the evaluation process.<sup>148</sup>

In 1987, Reverend Sullivan called the principles a failure<sup>149</sup> and abandoned them in favor of a call for total divestment in South Africa.<sup>150</sup> Even though the principles did not end apartheid within the timeframe set by Sullivan, they fostered significant progress and were likely one of the factors that led to its abolition.<sup>151</sup> Between 1977 and 1982, the number of firms adopting the principles increased from twelve to almost 150.<sup>152</sup> These corporations provided scholarships to blacks, increased the number of nonwhite supervisors and managers from only a handful to 30%,<sup>153</sup> and provided over \$150 million in funding for health, education, and housing in their communities.<sup>154</sup> In addition, corporate executives stated that the collection and disclosure of information required by the Sullivan Principles allowed them to learn from the experiences of others in programs for

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4. Initiation and development of training programs that will prepare in substantial numbers Blacks, and other non-whites for supervisory, administrative, clerical and technical jobs.

5. Increasing the number of Blacks and other non-whites in management and supervisory positions.

6. Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.

Anderson, *supra* note 139, at 477.

145. *See id.* at 478.

146. *See* Zondorak, *supra* note 141, at 474; Perez-Lopez, *supra* note 142, at 43. The Industry Support Unit, an organization of the signatories to the Sullivan Principles, employed Arthur D. Little for this task. *See id.*

147. Perez-Lopez, *supra* note 142, at 43.

148. *See generally* Alexandra Bernasek & Richard C. Porter, *Private Pressure for Social Change in South Africa: The Impact of the Sullivan Principles*, 55 REV. SOC. ECON. 172 (1997). Many signatory corporations also provided their performance information to the Investor Responsibility Research Center, which published the information in its periodic newsletters. *See id.*

149. *See* Richard T. De George, "Sullivan-Type" Principles for U.S. Multinationals in Emerging Economies, 18 U. PA. J. INT'L ECON. L. 1193 (1997).

150. *See* Zondorak, *supra* note 141, at 478.

151. For a limited empirical analysis challenging the effectiveness of the Sullivan Principles, *see generally* Bernasek & Porter, *supra* note 148.

152. *See* Anderson, *supra* note 139, at 478.

153. *See* Perez-Lopez, *supra* note 142, at 43. This progress continued throughout the 1980s. The percentage of white workers managed by nonwhites increased from 3.1% in 1983 to 8.4% in 1984. *See* Zondorak, *supra* note 141, at 476.

154. *See* Perez-Lopez, *supra* note 142, at 43. During 1988 and 1989, these corporations donated \$60 million to programs for minorities. *See id.* at 476.

desegregation, training, and employee housing.<sup>155</sup>

Many factors encouraged corporations to adopt the Sullivan Principles. One commentator listed:

increased media reporting; university hype and rising public interest concerning the role of business in South Africa; the need to improve corporate image and credibility with domestic groups; the growing number of shareholder resolutions calling for adoption of the Sullivan Principles; and the growing use of the Sullivan Principles by investors as a measure for moral determinations regarding their investments.<sup>156</sup>

When Sullivan called for divestment in South Africa, these same factors also encouraged that behavior.<sup>157</sup>

Today, Reverend Sullivan supports and promotes a general set of principles known as the Global Sullivan Principles for individual firms to endorse.<sup>158</sup> These broad principles represent a general policy commitment by an endorsing firm to ideals of equal opportunity and quality of life. Their coverage far exceeds the more targeted and specific anti-apartheid principles and encompasses respect for intellectual property and a commitment to sustainable development. The only proviso of the Global Sullivan Principles dealing with bribery is: "Promote fair competition . . . and not offer, pay or accept bribes."<sup>159</sup>

#### B. Developing Anti-Corruption Principles

To have an impact on the practice of corruption, any set of principles must (1) emphasize transparency; (2) provide guidance concerning specific practices associated with paying bribes; (3) be relevant to organizational environments; (4) identify itself with and be supported by an independent entity such as a non-governmental organization or an academic center, and, perhaps most importantly; (5) be capable of monitoring and assessment by external, independent entities, such as social and financial auditors. Although some existing statements of principles that contain references to bribery meet some requirements, none meet them all. For example, although the Global Sullivan Principles have great credibility in their association with Reverend Leon Sullivan, their generality with regard to bribery provides little guidance to firms concerning specific practices. In fact, it would be virtually impossible to determine whether a firm is acting consistent with the standard. A firm with an excellent anti-corruption program, which meets the standards of current practice, might still be victimized by a rogue employee and therefore seemingly fail to meet the Global Sullivan standard. Similarly, Richard De George's proposed standards, discussed briefly below, offer only general guidance and are not yet connected with a supporting independent entity.

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155. See Zondorak, *supra* note 141, at 475 n.92.

156. *Id.* at 477 (citations omitted).

157. See *id.* at 479 n.120.

158. See *The Global Sullivan Principles* (visited Aug. 26, 2000) <<http://department.stthomas.edu/mccr/SullivanPrinciples.htm>>.

159. See *id.*

### C. Sources for the C<sup>2</sup> Principles (for Combating Corruption)

The proposed C<sup>2</sup> Principles draw from the International Chamber of Commerce's rules of conduct, the recent consent agreement between the United States and Metcalf & Eddy, Inc., pertaining to the Foreign Corrupt Practices Act, compliance and control programs already existing at firms, the business ethics literature, and other sources.

In the recent civil case *United States of America v. Metcalf & Eddy, Inc.*,<sup>160</sup> the defendant was accused of providing an Egyptian government official with travel, lodging, and entertainment expenses to induce that official to grant Metcalf & Eddy two sanitary drainage contracts sponsored by the United States Agency of International Development (USAID).<sup>161</sup> Without admitting or denying these allegations, Metcalf & Eddy agreed to a settlement with the Department of Justice (DOJ), which required the company to establish an FCPA compliance program. In other settlement agreements, the DOJ required companies to implement FCPA compliance programs, but *Metcalf* was the first time the DOJ outlined minimum requirements for such a program.<sup>162</sup> The DOJ developed the compliance program based on the Organizational Sentencing Guidelines, which the DOJ adapted to the specific case of bribery and Metcalf & Eddy's situation.

The compliance program required Metcalf & Eddy to articulate a clear policy against FCPA violations and establish standards and procedures "reasonably capable of reducing the prospect of violative conduct."<sup>163</sup> The company must assign one or more senior officials to oversee the compliance program, including monitoring and auditing systems to detect violations by employees and other agents, and appropriate disciplinary mechanisms for violations and monitoring officials who failed to detect a violation. The program must also require employees, agents, consultants, and other representatives of the company to be trained regularly regarding the company's compliance policies and procedures.<sup>164</sup>

The firm should establish a reporting system that allows an employee to report suspected criminal conduct without having to go through his or her direct supervisor and without fear of retribution.<sup>165</sup> Metcalf & Eddy

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160. The authors obtained copies of the complaint and the consent and undertaking filed by the defendant from the Fraud Section of the Department of Justice (on file with authors) [hereinafter Defendant's Filings].

161. The alleged payments involved two trips the Egyptian official made to the United States. Under the Federal Travel Regulations, Metcalf & Eddy could provide the official with a cash per diem payment to cover certain travel expenses in advance of his visit. On these trips, however, Metcalf & Eddy provided the official with 150% of estimated expenses, paid for most of the official's expenses once he and his family were in the United States—the expenses the per diem was intended to cover—upgraded the official's airline tickets to first class, and had two undocumented cash advances granted to a Metcalf & Eddy official prior to and during one of the official's visits, which were presumed to be cash payments to the official.

162. See Susan Kavanagh, *Minimum Requirements for FCPA Compliance Program*, in *FEDERAL ETHICS REPORT*, Jan. 2000, at 1.

163. Defendant's Filings, *supra* note 160.

164. See *id.*

165. See *id.*

also should establish procedures and a review committee to insure against the delegation of authority to or partnership with individuals or companies with a propensity to engage in corrupt behavior. All contracts with agents and other representatives should include a clause stating that the firm will offer no bribes and the agent will not employ a sub-agent without the prior written consent of a senior official of Metcalf & Eddy. Finally, the company should keep records that accurately reflect all transactions and dispositions of the company's assets and maintain a system of internal accounting controls.<sup>166</sup>

In 1996, the ICC adopted Rules of Conduct to Combat Extortion and Bribery and encouraged corporations to adopt and adapt these principles in their own codes of conduct.<sup>167</sup> The ICC established the code of conduct as a method of self-regulation. The code provides that no one may directly or indirectly accept or demand a bribe or a kickback, including the use of subcontracts, purchase orders, or consulting agreements to channel payments to others. When using agents, the enterprise must ensure that it pays the agents only for services rendered and not for paying bribes. The enterprise should also maintain a record of those agents and their terms of employment. Enterprises must properly and fairly record all financial transactions and establish independent systems of auditing. Top management or the board of directors should establish a system of control to prevent the payment of bribes, provide clear policies and training programs, and take appropriate action against anyone who breaches the code of conduct. In addition, enterprises should disclose any contributions to political parties.

Richard De George proposed the idea of "Sullivan-like" principles for U.S. multinationals doing business in Russia and other former Soviet states.<sup>168</sup> He offered five simple principles, including that "[s]ignatories will not pay bribes or extortion."<sup>169</sup> De George reasoned that if a number of companies concurrently take such an approach, they would avoid the onus of individual action, helping to offset the power of the mafia and corrupt government officials.<sup>170</sup> He also suggested that endorsing the principles would send a signal to U.S. consumers that the signatories are operating ethically in those environments.<sup>171</sup> De George further argued that the transparency resulting from this approach would make it difficult for corrupt officials to demand bribes, thereby encouraging the development of adequate and efficient background institutions—both legal and governmental, which are necessary to support a less corrupt

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166. See *id.*

167. See ICC, *Extortion and Bribery in International Business: Part II: Rules of Conduct to Combat Extortion and Bribery* (visited Aug. 26, 2000) <[http://www.iccwbo.org/home/statements\\_rules/rules/1999/briberydoc99.asp](http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp)>.

168. See De George, *supra* note 149.

169. *Id.* at 1203.

170. See *id.* at 1200-03, 1206-07.

171. See *id.* at 1206-07.

environment.<sup>172</sup>

#### D. The C<sup>2</sup> Principles<sup>173</sup> (to Combat Corruption)

The following principles are offered to all firms, wherever situated and whatever their lines of business.<sup>174</sup> In addition, the principles are applicable to all business activities of the endorsing firms. A corporation endorsing the C<sup>2</sup> Principles pledges:

1. To disclose publicly and make widely known its endorsement of the C<sup>2</sup> Principles.

2. To establish a clearly articulated written policy prohibiting any of the firm's employees from paying or receiving bribes or "kickbacks."

3. To implement the policy with due care and take appropriate disciplinary action against any employee discovered to have made payments in violation of the policy.

4. To provide training for employees to carry out the policy, and to provide continuing support, such as help lines, to assist employees to act in compliance with the firm's policy.

5. To record all transactions fully and fairly, in accordance with clearly stated record-keeping procedures and accounting controls, and conduct internal audits to assure no improper payments are made.

6. To report annually on the firm's bribery and corruption policy, along with a description of the firm's experiences implementing and enforcing the policy.

7. To have the annual report in principle six audited either by an independent financial auditor or an independent social auditor, or both.

8. To require all agents of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party.

9. To require all suppliers of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party.

10. To establish a monitoring and auditing system to detect any improper payments made by the firm's employees and agents.

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172. In 1995, the Clinton Administration published a set of Model Business Principles for corporations operating abroad. See Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 *DICK. J. INT'L L.* 207, 227-28 (1996). This set consisted of five principles, including one that simply states that corporations should comply with U.S. laws prohibiting illicit payments. These principles gained little attention because they were vague and not well-publicized by the White House. See *id.* at 227-228 (noting that the principles were unveiled by mid-level officials who did not want their names used, at a location away from the White House, and on paper without any U.S. government identification).

173. As endorsed and approved by the Caux Roundtable. See *supra* note 82 and accompanying text.

174. This is in contrast to proposals such as those made by De George, which are applicable only to firms from designated home countries and certain regions of the world. See De George, *supra* note 149.

11. To report publicly any solicitations for payments, or report privately to a monitoring organization or a social auditor.
12. To establish a system to allow any employee or agent of the firm to report any improper payment without fear of retribution for their disclosures.

### 1. *Policies, Procedures, and Publications*

Throughout the C<sup>2</sup> Principles run the overlapping themes of policies, procedures, and publications. Policies refer to a firm's avowed commitment to refuse to pay bribes and to train its employees to carry out firm policies to that effect. Firms should not endorse the principles simply for public relations purposes or to emulate other firms in their industry. Rather, firms should only endorse these principles on a voluntary, sincere, and genuine basis. Adhering to these principles requires a firm to move beyond merely establishing a code of conduct to proactively guiding the behavior of corporate employees and establishing a compliance program to prevent improper payments.

Principles one through four reflect the required policies. By adopting the principles, a corporation signals its full commitment to combating corruption to its external stakeholders and employees. This is an external affirmation that fighting corruption is a core value of the firm. Establishing this as a core value also requires making all employees aware of the firm's policies and providing appropriate training and support to guide employees in making decisions consistent with those policies. To establish the legitimacy of these policies requires taking disciplinary action against employees who violate them.

The second theme is necessary procedures. Principles five, eight, nine, ten, and twelve establish procedures to control payments inconsistent with corporate policy. These procedures work to control bribery from a variety of angles. First, under principle five, firms need appropriate accounting and auditing practices to ensure that they have authorized and accounted for all firm expenditures. Principles eight through ten focus on controlling common problems firms have in complying with the Foreign Corrupt Practices Act. Agents, particularly those assisting with sales and marketing, often have been the conduits through which firms have made payments. In some circumstances, firms may not have known whether the marketing agents have used part of their commissions and fees to make improper payments to public officials.

Due to these problems, the DOJ's compliance program for Metcalf & Eddy, for instance, requires a committee to review the firm's retention of any agents and to exercise due care to ensure against employing an agent with a propensity to make improper payments. The DOJ's program also requires all agents to sign contracts stating that they will not make improper payments or retain subagents without the prior written consent of a Metcalf & Eddy senior officer. The C<sup>2</sup> Principles are consistent with this compliance program in that they require firms to obtain from their

suppliers and agents statements to the effect that they have not and will not make improper payments.

Principle ten goes even further, requiring that firms use an auditing system to detect any improper payments. In addition, principle twelve furthers the ability of employees to report any violations without fear of retribution. The establishment of anonymous hotlines can achieve this objective, so that whistleblowers do not have to file reports through anyone in their immediate management.

The third theme, publication, concerns full disclosure of the firm's efforts and performance. Principles one, six, seven, and eleven further this goal. As discussed above, principle one signals commitment to combating bribery to those outside the firm. Principles six and seven provide for external validation of a firm's efforts. Perhaps the most controversial proviso is principle eleven, which requires that firms commit to public reporting of solicitations for payments or, if that is not feasible because of threats of violence or extortion, they report the request privately to a social auditor or a monitoring organization, such as Transparency International. Public disclosure is probably the best way to discourage the demand side of bribery.

## 2. *Coherence and Credibility*

To reduce the supply side of bribery, the C<sup>2</sup> Principles require coherence and credibility.<sup>175</sup> Coherence refers to a unified approach for combating bribery, such as through the adoption of the same set of principles by many corporations. Credibility requires assurances that each corporation is living up to its pledge through independent monitoring and public disclosure.

A coherent approach provides several significant benefits. It levels the playing field by ensuring that all corporations are playing by the same rules and that government officials are fully aware of those rules. By knowing that its competitors are not paying bribes, a corporation is assured that it does not have to pay a bribe and can compete based on the quality and price of its product or service. The efforts of non-bribe-paying corporations facilitate other corporations' efforts to find honest agents, suppliers, and other business partners, as they are not required to "reinvent the proverbial wheel" on each business venture in a new country or region.<sup>176</sup> Overall, a coherent approach strengthens a firm's ability to operate bribe-free, as "[j]oint refusal of payment of bribes or extortion lessens the necessary courage, cost, and difficulty of refusal to do so individually."<sup>177</sup>

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175. See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 *LAW & POL'Y INT'L BUS.* 111, 113, 131-39 (1998) (arguing for coherence and credibility in corporate codes of conduct and product labeling schemes to promote international labor rights).

176. See De George, *supra* note 149, at 1201 (discussing the problems of attempting to communicate a message of corrupt-free business dealings firm by firm in Russia).

177. *Id.* at 1206.



On the demand side, corrupt government officials would know that corporations would deny and possibly disclose their requests for bribes. As seen from the experience with Transparency International's Corruption Perception Index, being known as a highly corrupt country can be highly embarrassing for a country's top government officials, may have financial implications from lowered foreign direct investment, and can spur reforms in that country.<sup>178</sup> This is also supported by the Council of Europe's efforts to reduce corruption by using "peer pressure" to encourage governments to implement necessary reforms.<sup>179</sup>

A coherent approach also provides benefits to the public. Investors, consumers, and other stakeholders of the firm can easily determine if a firm is doing its part to combat corruption and bribery. Without this coherence, an interested stakeholder would have to analyze each firm's code of conduct to determine its approach, if any, to combating bribery.

While a coherent approach requires a significant number of firms independently to adopt the C<sup>2</sup> Principles to be fully effective—since only then can the problems of defections and free-riding be overcome—there are significant benefits to each adopting firm. Beyond the cooperative benefits, a firm's endorsement signals to the market that it is taking seriously the moral concerns regarding corruption. Further, any firm attempting to ride on the efforts of others can easily be singled out.

A business principles approach to combating bribery must also be credible. Credibility requires external monitoring and public disclosure. The firm should disclose its policies, performance, and auditors' reports, as well as its pledge to the principles. These could be freestanding reports disclosing the firm's performance, or they could be incorporated into other reports of the corporation. This requirement of the C<sup>2</sup> Principles is consistent with current developments in corporate disclosure on social issues. The idea of corporate social auditing, accounting, and reporting (SAAR) is gaining popularity in Europe and the United States. SAAR is similar to financial accounting and reporting, but focuses on measuring the social performance of a corporation in relation to the expectations of the firm's stakeholders.<sup>180</sup>

The Global Reporting Initiative (GRI) is a major international effort to improve the quantity and quality of social reports available to the public.<sup>181</sup> Formed in 1997, the GRI is a collaborative effort of large accounting firms, non-governmental organizations, corporations, universities, and others. It seeks to establish a common framework for corporate reporting that allows corporations and their stakeholders to understand better the link between a firm's economic, environmental, and social performance. A

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178. See *supra* Part I.B.

179. See *supra* notes 62-63 and accompanying text.

180. See Hess, *supra* note 97, at 43. Social reports concern firm performance on such issues as the environment, product safety, employment discrimination, and community involvement. See *id.* at 69-70.

181. See generally Global Reporting Initiative, *Sustainability Reporting Guidelines: Exposure Draft for Public Comment and Pilot Testing* (visited Sept. 14, 2000) <<http://www.globalreporting.org>>.

firm's compliance with the C<sup>2</sup> Principles easily could be incorporated into reports published under the GRI or some other standard. In addition, a firm's efforts at monitoring compliance could benefit from the SAAR processes a firm must establish to produce a social report.

Whether published as part of a broader social report or as a stand-alone report, a firm should annually provide publications to the widest possible audience regarding its performance with respect to the C<sup>2</sup> Principles. For example, making such reports available on a company website would be a cost-effective way for the corporation to provide this information to any interested person. Based on these public disclosures, an entity, such as Transparency International, may compile information on corporate performance.

By making this information public, monitoring mechanisms would emerge in the same way as with the Sullivan Principles. The Sullivan Principles used a system of foundation monitoring.<sup>182</sup> A foundation funded by the signatories of the principles used a third-party agent to monitor the firms' compliance with the principles. Many were dissatisfied with this approach, however, as the monitoring agent did not reveal its system for rating corporations' compliance with the Sullivan Principles.<sup>183</sup> This non-disclosure raised significant doubts about the credibility of the system. To avoid these problems, the C<sup>2</sup> Principles require an independent monitoring agent or agents operating under conditions of full transparency. This approach is necessary to ensure that corporations have a compliance program and meet all twelve principles.

An effective monitoring system requires trustworthy information. Beyond issues of disclosure, the increased focus on SAAR also serves to develop the auditing and verification aspects of a social reporting process. When the Sullivan Principles were first announced, corporations and accounting firms had little experience auditing these non-traditional aspects of accounting. While C<sup>2</sup> principle five concerns more traditional, accepted accounting procedures, the overall goals of the principles are in line with the developments in SAAR. Organizations such as the Institute of Social and Ethical AccountAbility<sup>184</sup> in the United Kingdom, which is developing auditing standards and an accreditation path for accountants and auditors in SAAR,<sup>185</sup> can provide significant assistance in establishing the credibility of reports filed under the C<sup>2</sup> Principles.

## V. Conclusion

Throughout the world, an attitude is emerging that corruption is a serious problem that can no longer be tolerated. Corporations that are not responsive to these attitudes may suffer a backlash in capital and consumer mar-

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182. See Liubicic, *supra* note 175, at 135.

183. See generally Bernasek & Porter, *supra* note 148.

184. See AccountAbility Inst. of Soc. & Ethical AccountAbility, *AccountAbility* (last modified July 31, 2000) <<http://www.accountability.org.uk>>.

185. See AccountAbility Inst. of Soc. & Ethical AccountAbility, *The AccountAbility Professional Qualification* (visited Feb. 12, 2001) <<http://www.accountability.org.uk.F.htm>>.

kets. By adopting the C<sup>2</sup> Principles proposed here, a firm can demonstrate its commitment to fighting corruption. With many corporations adopting the Principles, a cooperative, anti-bribery system emerges; a system that may significantly reduce the supply of corruption.